



FROM LIABILITY TO ABILITY – GETTING A DEAL DONE

LIABILITY AND MTCA
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The opinions expressed here are my own, and are not the official position of the Washington Attorney General's Office or the Department of Ecology.

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How did MTCA start?

- Initiative 97 (The Model Toxics Control Act) (1987).
 - The Hazardous Waste Cleanup Act.
 - Initiative 97B.
 - Which would win?



What did the voters do?

- Voters determined they did want a law on the subject (85%)
- Voters chose Initiative 97 over Alternative 97B (56%)



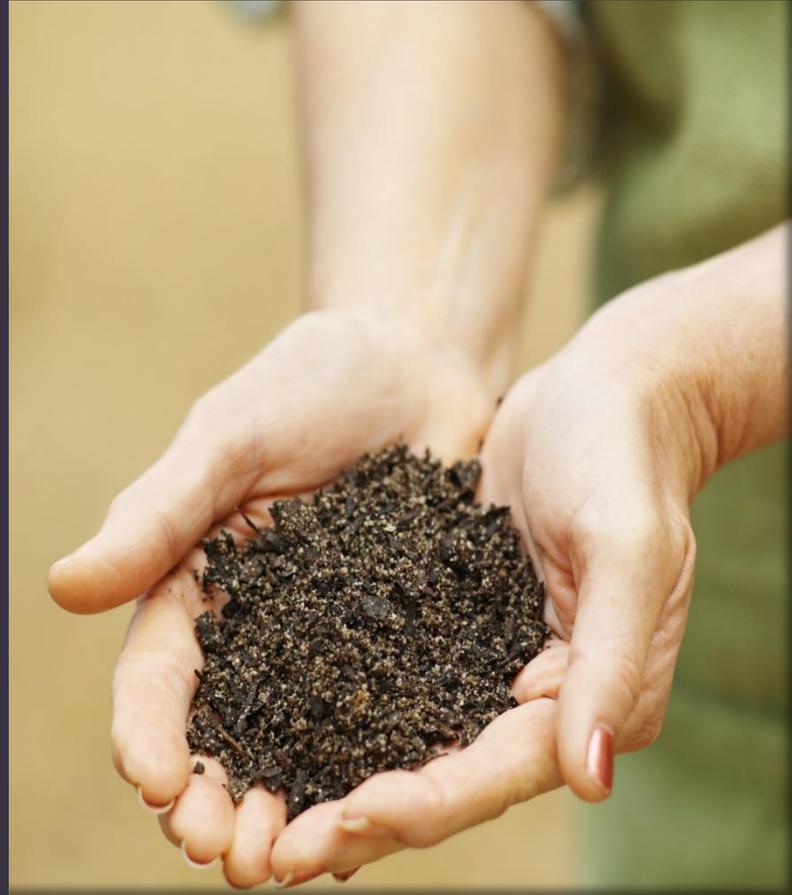
So what exactly is MTCA?

- Cleanup of contaminated sites.
- Creates the financial structure to fund cleanup through a tax on the wholesale value* of hazardous substances.
- Allows the state to recover for natural resource damages resulting from a release or threatened release of hazardous substance.
- The Department of Ecology is granted various rulemaking authority to implement MTCA.

* In the final days of the 2019 legislative session, SB 5993 was passed, creating large-scale changes to how MTCA is funded. The new HST will be a volumetric tax (pending the governor's signature).

What makes a site?

- Release of a hazardous substance into the environment.
- Site is defined by where a hazardous substance has come to be located.
- Remedial action is required at a site if the contamination is a risk to human health or the environment (i.e., is above the cleanup level).



Your client discovers
contamination on their property



Discovery and Reporting

Owners and operators are required to report the discovery of a release of hazardous substances that may pose a threat to human health or the environment (see WAC 173-340-300(3) for exemptions).

- Underground Storage Tank—within 24 hours of confirmed discovery.
- Other releases—within 90 calendar days of discovery.



And then what?



- Ecology Conducts an Initial Investigation:
WAC 173-340-310
- Ecology Prepares a Site Hazard Assessment:
WAC 173-340-320
- Ecology Lists on the Hazardous Sites List:
WAC 173-340-330

What makes someone “liable?”

Any past or present relationship with a contaminated site may result in liability.

- current owner or operator
- past owner or operator (at time of release)
 - arranger
 - transporter

Are there any exceptions to being “liable”?

YES!

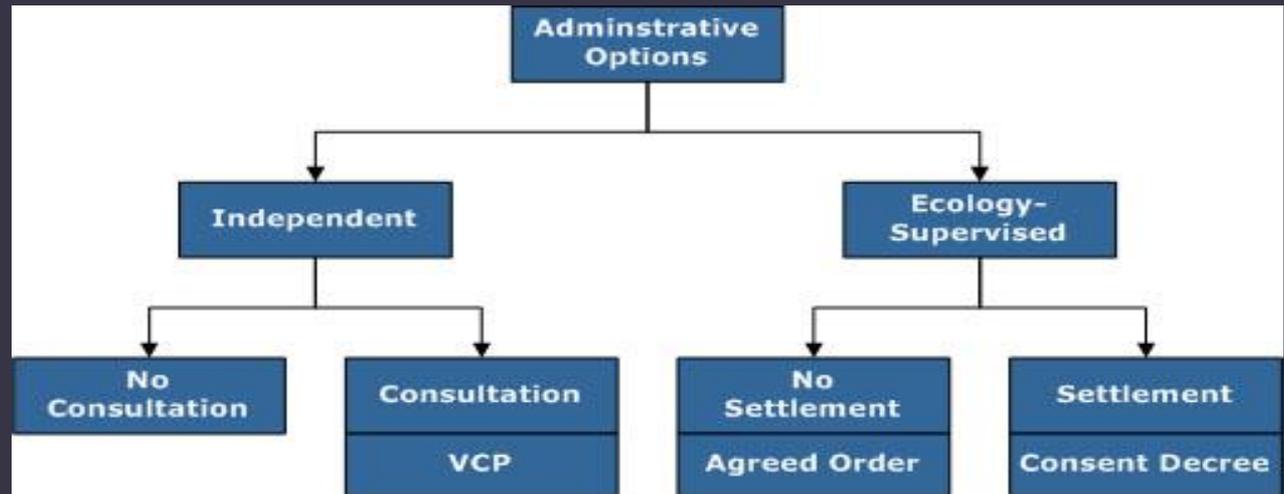
- Exceptions to definition of “owner or operator”:
 - State or local agency that acquired property involuntarily.
 - Lender that did not participate in management.
- Defenses to MTCALiability:
 - Third party defense.
 - Innocent landowner defense.
 - “Plume Clause” defense.

Liability if I loaned money used to buy contaminated property?

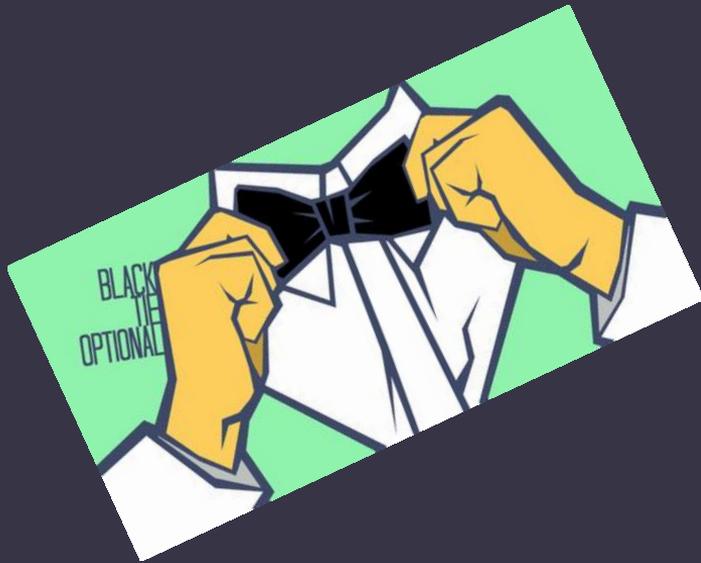
- Generally immune from liability so long as maintain the role of a traditional lender.
 - DO NOT become actively involved in management of the property.
 - Exception for temporary control to preserve the value of collateral or mitigate any default.

How to deal with your release: Independent, VCP, or Formal?

- Independent cleanup without consultation
 - Required to send Ecology a report once you are done.
- Independent with consultation (Voluntary Cleanup Program)
- Ecology-supervised cleanup without settlement (Formal)
- Ecology-supervised cleanup with settlement (Formal)



Going “formal?”



Ecology has discretion to determine if cleanup of a site requires oversight.

- Ecology sends a preliminary status letter to all PLPs for the site.
- Ecology sends a Determination of Status Letter.
- The Remedial Investigation and Feasibility Study will be conducted under an Agreed Order.
- The Cleanup Action Plan, with Ecology’s preferred cleanup alternative will be implemented through a separate Agreed Order or a court-supervised Consent Decree.

Model Remedies

- MTRCA rule amendments include provisions for establishing model remedies.
- The purpose is to streamline and accelerate the selection of cleanup actions.
- Sites meeting the criteria for use of a model remedy are not required to conduct a:
 1. Feasibility Study, or
 2. Disproportionate Cost Analysis

Draft Cleanup Action Plan (CAP)

- Ecology will choose the cleanup action alternative.
- The draft CAP must go out for public review/comment.
- The CAP is Ecology's decision document for the site.
- It will include: a history of the site, cleanup standards for each affected media, the remedy selected, a schedule for remedial actions, ARARs and permits required for the remedial action.
- A SEPA determination on the cleanup action must be done no later than the implementation of the final Cleanup Action Plan.

How to implement the CAP

- Ecology may use an Agreed Order, Enforcement Order or Consent Decree to implement the CAP.
- The state may settle with a PLP for the site if: (1) Ecology determines the proposed settlement will lead to a more expeditious cleanup; and (2) the attorney general agrees to a settlement.
- A settlement is entered as a CD issued by the court.
- The CD may include a covenant not to sue (with reopener clause).
- The CD must include “contribution protection” – a party who has a settlement with the state is not liable for claims for contribution for matters addressed in the settlement.

Filing the Consent Decree

- Ecology will provide the PLPs with a draft CD and CAP.
- The final CD, CAP, and SEPA determination go out for public review/comment.
- Filing the CD resolves and completes the case so no scheduling order is needed.
- Typically the matter is handled *ex parte*.



Satisfaction of Order or Decree

- An AO is complete when all of its provisions have been satisfied and Ecology issues a written notification.
- A CD is complete when all of its provisions have been satisfied, Ecology issues a written notification to the parties, and the judge orders a dismissal.
- An order or decree is not complete if post-cleanup remedial actions are necessary to control or monitor the remaining contamination.
 - Ecology may provide the PLP with a status letter once all construction work has been completed and only monitoring and/or periodic reviews are required.

Prospective Purchaser CDs:

- Parties who are wanting to settle liability prior to becoming PLPs:
 - Cannot already be liable at that site.
 - Substantial new resources to facilitate cleanup.
 - Expedite remedial action.
 - Proposed development or reuse cannot:
 - contribute to the existing release or threatened release.
 - interfere with the remedial actions.
 - increase health risks to persons at or in the vicinity.

What is a *de minimis* settlement?

- MTCA authorizes a settlement with a PLP where the amount of contamination contributed by the PLP is “insignificant in amount and toxicity.” RCW 70.105D.040(4).
- TCP Policy 520C (established January 2006, revised December 2016) provides a process for evaluating if a party qualifies as a *de minimis* PLP.
- A *de minimis* settlement may be “cash out” or for certain activities a combination of both.

What about other PLPs? How do you cost recover?



- A private right of action, including a claim for contribution, is available for recovery of remedial action costs from another PLP.
- The court will determine if the person is liable under MTCA, and if so will apportion liability based on any equitable factors the court considers appropriate.
- Action must be brought within 3 years from the date remedial action confirms cleanup standards are met.

What's been going on in the courts?

What, Me Worry?



- *Douglass v. Shamrock Paving, Inc.* (WA Supreme Court)
- *Pope Resources v. DNR* (WA Supreme Court)
- *Pakootas v. Teck Cominco Metals, Ltd.* (9th Circuit)
- *Travelers Indemnity Company v. City of Richland* (9th Circuit)
- *Seattle Times Co. v. LeatherCare Inc.* (9th Circuit)
- *Port of Anacortes v. Frontier Industries, et al.* (COA, Div1)
- Clean Water Act groundwater cases
 - *Hawaii Wildlife Fund v. County of Maui* (Ninth Circuit)
 - *Upstate Forever v. Kinder Morgan* (Fourth Circuit)
 - *Sierra Club v. Virginia Electric Power Co.* (Fourth Circuit)
 - *Tennessee Clean Water Network v. Tennessee Valley Authority* (Sixth Circuit)
 - *Kentucky Waterways Alliance v. Kentucky Utilities Co.* (Sixth Circuit)

Questions?

